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A
L E T T E R
TO THE
EARL of CHATHAM,
ON THE
Q U E B E C B I L L.

THE FIFTH EDITION.

By Lord Althorpe

L O N D O N :

PRINTED FOR T. CADELL, IN THE STRAND.

MDCCLXXIV.

RC 911.1774, M47

MY LORD,

THE bill for the government of Quebec, whilst it engages the attention of the public, cannot but bring back to our minds that glorious æra when Canada was added to the British empire, by the success of his Majesty's arms, directed by the genius, and animated by the vigour of your councils. It has too often happened that national *wisdom* has slept, while the spirit of conquest has been awake; in the midst of victories and of triumphs, we are not to wonder that the low and still voice of jurisprudence was never heard;

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but,

but, at length, is the time come when a system of government is to be formed for that extensive country, differing from our own in her religion, her laws, her habits, and her customs. Had the question once occurred to your Lordship how that ought to be done, the possession of Canada might not perhaps have been the first object of your care in preference to Guadaloupe, Martinique, and the other rich islands which were restored to the French and Spaniards in the West Indies. But it does not appear that the civil establishment of Canada had ever a place in your thoughts; because, after thirteen years possession of the country, your mind was so entirely vacant on this subject, that I don't find your Lordship proposed one idea of your own, either for the framing of any law, or for the amendment of that law which has lately received the royal assent.

If

If ever there was an event on which the public might demand an opinion, it had a right to yours on the settlement of Canada. From your rank and experience in the state, your importance in your country, and, above all, as the achievement was yours, the manner of maintaining it should have been yours also. You was the minister, when Canada was conquered. When you returned to power a second time, you proposed no legislative act for its regulation and government: must I then say to you, my Lord, "*Vincere scis, victoriâ uti nescis.*"—If your abilities are confessed, who can excuse your neglect? Or if, in this business, either inaccuracy of head, inattention of mind, or incorrectness of judgment, may be imputed to any man, on whom can that charge fall more justly than upon your Lordship? Why then did you choose this peculiar moment to

break forth from your retirement? Surely, my Lord, your condescension is not such as to lead you to become the meer harbinger of my Lord Mayor, and his address *within* the palace, and of his co-patriots *without*, who attended his Majesty from St. James's to the parliament.

The *doors* of the house of lords are shut, but Lord Chatham's expressions are not (nor are they meant to be) confined. I mean not to comment on your assortment of the epithets by which you described the act of parliament—they were “*atrocious, shallow, inept.*” Popery, you said, was established, the Protestant church devoted, the veil of its temple rent asunder; and that the King's ministers might as well begin to pull down all the protestant steeples; for these ministers had at length thrown
off

off the masque, and opened their plan of despotism.

This plan of despotism, my Lord, is the substitution of an act of parliament in lieu of a government by proclamation ; a proclamation which at first was dictated, has been often varied, and till this time has subsisted by the meer will and pleasure of the crown. It was *imperium hominis* that has governed the Canadians since the peace ; it is *imperium legis* that is to govern them hereafter. Is it necessary for me to explain to your Lordship which is a state of liberty, and which of tyranny ? Conversant with the history and fate of nations, your Lordship knows that all those unhappy people who have lost their liberties, have seen those liberties end precisely where the government of will began. But your Lordship is pleased to
 reverse

reverse this proposition ; and you, who in your love of paradoxes formerly told us that Canada was conquered in Germany, now tell us that this same Canada is enslaved, because it is no longer to be governed by proclamation, but by law.

Let us stop for a moment, to see what the government of Canada was, under the proclamation which you wish to perpetuate,—it comprehended East Florida, West Florida, and the Grenades, together with Canada, countries as different in their establishments as in their soil, and in their climate ; various therefore were the instructions given to the several governors, and afterwards changed according as information and experience pointed out new systems. In Canada, the French laws alone prevailed till 1764, then the English laws
got

got some footing. The governors and officers of justice *always* doubtful which to take for their guide, sometimes preferring the English, sometimes the French laws, as each seemed applicable to the case before them—One year a proclamation, another year an instruction to a governor, another year a local ordinance, changed the principle, and varied the course of their justiciary proceedings.—In this state of fluctuation, no man knew by what right he could take, or give, inherit, or convey, possess, or enjoy property; or by what mode or rule he could bring his right to a trial. One necessary consequence was a frequent resort to the crown for amendment, explanation, and decision; “*cujus est, condere, ejus est interpretari.*”—And what less than despotism is the power of the crown, when it can create or interpret, establish or destroy laws, by virtue of its own mandates?

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The condition of these wretched people under this government, is described by lord Coke in the very motto which he chose for his works, "*misera est servitus ubi jus est vagum aut incognitum.*" I need not tell your Lordship that the parliament of Henry VIII. gave the king's proclamations the power of law ; it must give some comfort to all sober people to see the parliament of this day annul the force of a proclamation, in order to establish law.—If therefore I can agree with you, my Lord, in thinking the king's ministers are so atrocious as to have formed any plan of despotism, I must agree with you also, that they are more inept and shallow in the execution, since they have let go the very power which you say they grasp at. And if there could ever be a proper time to insult the king's person with a cry of arbitrary power, surely, my Lord, there
could

could have been no time less seasonable than that, when he was going to give his assent in parliament to restore to the Canadians their birth-right in their laws, and to relinquish that very power which conquest had put in his hands.

This proclamation, however, we are told, with the treaty, and other acts of royal authority, was considered as an engagement, under which the colonists embarked their persons, and the merchants their fortunes for Canada, and that the national faith was plighted to form a government *as near as might be* agreeable to the laws of England; for it is said that none would have embarked or traded thither, without the prospect of English laws, and of English juries. How far the real engagement has been kept, and whether any part of the laws of England, that could be executed, have been with-held, we

shall enquire bye and bye; but first let me appeal to your Lordship's knowledge, and the knowledge of every man, whether it is necessary there should be a trial by jury, wherever our merchants export their manufactures? In all our great foreign markets there are no juries: in America there *are* juries; but if you will ask the merchant whether he expects a surer payment from Hamburgh, &c. or from Boston, I don't believe he will answer for the Bostonians.

It would be impertinent, my Lord, to introduce what I shall take the liberty to say upon juries, with any pagnyrick upon that blessed institution.— Its praises are written in our hearts: but the constitution of juries may be compared to a fabrick, where every minute material is essentially necessary to the safety, usefulness, and beauty of
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the whole. Permit me then just to mention what an English jury *is*, before I ask what a Canadian jury *must be*. In England, the sheriff in a public manner takes the names out of the list of freeholders, as chance has placed them. He *may* return six panels, which are seventy-two jurors, and he *cannot* return less than four, which are forty-eight at every assize; and, that these jurors may not become hackneyed in their office, or marked for seduction, none are to be returned, but who have not served for two years before, (except in Middlesex, where the law has been altered, perhaps for the worse, for Middlesex juries, though better practised, are not more respectable than other juries;) and in Yorkshire, because of the largeness of the county, freeholders cannot be returned but once in four years.

Thus, my Lord, the uncertainty of who shall be jurors, and the nature of the office itself commencing instantly, and ending instantly in public court, gives no possibility of previous solicitation or seduction; but still there follows a right of challenge, to exclude every man against whom a suspicion lies of partiality or prejudice, whether from affection, affinity, or interest.

Let us now, my Lord, see what is the fund for an *English jury* in Canada; the number of freeholders (I do not say there are none) is small indeed; but there are about three hundred Englishmen, who are house-keepers, and of these, perhaps thirty or forty are of the rank of merchants and tradesmen; the rest are disbanded soldiers, most of them sutlers; and it is a melancholy consideration that their chief traffick is in spiritu-
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rituous liquors, of which they share pretty largely with their customers the common foldiers. The courts of justice sit once a week. The number of the better sort of English will not afford one legal panel in the whole year, and insufficient to do the business of juries, even supposing them to give up their time, and every other occupation to that service only: Mr. Maseres * therefore admits that the burthen of attendance would be intolerable *without pay*; and he proposes five shillings a head for every time they serve: thus the office of jurymen would become a trade, a trade indeed, that none of the better sort would follow, but must fall of course upon those veterans who have left the army for the gin-shop: Such must be the

* Attorney General of Quebec, who underwent a long examination at the bar of the House of Commons, during the course of the Quebec Bill.

English jury in Canada, without freeholders, without challenge, without change, and in short without one attribute of an English jury. *Corruptio optimi fit pessima*, is a true old adage, and I speak it as a proof of the perfection of an English jury, that in an imperfect or corrupted state it would be the worst way of trial upon earth.

But it may be said there are above an hundred thousand Canadians qualified to serve upon juries; why not take your juries from them? Because your Lordship will hardly trust the property of your countrymen to a jury of Canadians only. But the juries may be mixed,—in what proportion? If you take an *equal* number of English and of Canadians, how are they to decide at all? Or take an *unequal* number, and decide by the vote, (as in courts martial) then if the majority of the jury be
 Cana-

Canadians, the verdict will be the same as if the whole was Canadian, or if you throw the majority on the side of the English, where is the impartiality, on which the Canadian can depend? Besides, the civil law of France, and the trial by jury in England, are so dissonant, that the forms of one can never be blended into proceedings of the other; the rules in respect of tenures, alienations, dowers, and inheritances are quite different;---how could the law go on in the two different languages? If the *Canadian* should have a cause to try, how can his *advocate* prepare the process for an *English jury*? Or if he goes to an English attorney, how is the latter to settle a proceeding according to the laws of France? In truth, my Lord, as Canada is now constituted, common sense revolts against the establishment of a trial by jury in civil cases, whatever

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clamours may be incited by such as are ignorant of its tendency, and will never know its effects. But, happily, in criminal cases, a trial by jury is practicable, and therefore is it confirmed by the legislature. In criminal prosecutions, the forms are less complex, the pleadings simple, and the process summary. To the fact of guilt or innocence, one man is as competent as another; and in our own courts, it is the actual practice, where a foreigner is to be tried, to have a jury *de medietate linguæ*, one half English, one half Foreigners.

I mean not, my Lord, a general defence of the criminal laws of England, as they are of late years multiplied and extended. For if a moiety of those who are condemned were to suffer death, their blood would cry out for vengeance; and I am persuaded, that the frequency

quency of pardons, even where mercy is due, gives rise to nine in ten of the thefts and robberies that are committed. But the French law of torture to procure confession, is to us unknown. On the contrary, the accused person is, or ought to be, warned from injuring himself by his own confession. It is but modern law that any man could be convicted on his own confession, and even now confessions ought not to be admitted without the greatest caution.

To us is unknown likewise all cruelty of punishment; the instruments of barbarity and tyranny are not to be seen in our executions. From those appendages of despotism the Canadians are now delivered, and may live protected in their fortunes, their honours, and their lives, under what I trust will

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stand

stand for ever, the impregnable fortress of an English jury.

In the course of all the evidence that has been laid before the public, we find that the Canadians have expressed one constant uniform wish to be governed by their own laws, and that the English have as fervently desired to be governed by the laws of England. The Canadians are above 100,000, the English not more than 2000 men, women, and children. The legislature was therefore to consider whether the law and government ought to be adapted to the *many* or to the *few*.

There can be no rule for the composing of laws, but the sentiments and inclinations of those who are to be governed by them.

In a state of nature, liberty knows no bound but that of superior force.

Jura inventa metu injusti, and that portion of liberty which each man is willing to give up for the convenience, safety, and protection of individuals, of families, of societies, and of states, is the first principle of law. It is true, the multitude do not compose the form, but it must be framed to correspond with their genius and temper, so that their understandings may be prepared to meet, and their hearts ready to embrace it.—The habits, customs, and manners of a people, are the mirror in which alone their general disposition may be seen; even regard must be had to their prejudices and their weakness; for *law must be enacted* (as Grotius has expressed it) “*cum sensu humanæ imbecillitatis.*”

When Solon was complimented on having given good laws to his countrymen, his reply was, " They are only such as the Athenians are capable of receiving." Even the law of God, as proposed by Moses, was submitted to the judgment of the people before it was adopted by them *.

But if these rules are indispensable in the *formation*, they apply much more forcibly to the actual establishment of law. If nothing but violence can *impose* law, it would be still greater tyranny to rob a nation of that law which they approve upon experience, and which is endeared by habit. Allowing then that the Canadians prefer a worse law to a better, even that bad choice is decisive upon the conduct of Great Britain. They

* Exodus. yielded

yielded themselves up to our protection and our faith. How then can we deprive them of the first rights of human nature?

We are now come to that part of the bill which relates to their religion; and knowing, my Lord, how much you are an admirer of civil liberty, and can represent it with so many graces and advantages, I should have been glad to have heard that your Lordship, with equal grace and dignity, had supported the cause of *religious* liberty. But it seems you declared that no true Protestant could support this bill.—No true Protestant, my Lord, can be a persecutor; no true Protestant can harbour any such idea as that of establishing religion by force. Is the Spaniard in Mexico to be an example for a Protestant legislator?

Religious

Religious liberty is nearer to the heart and conscience than *civil* liberty; for why are Roman Catholics deemed enemies to our constitution? Not because they don't love liberty, (we owe Magna Charta to them) but because, without subverting the constitution and the law, the Romish religion can never be restored.

The Reformation was not the work of force.—Science had begun to dawn, and to dispel superstition. The tyranny of Rome was become hateful, and her authority contemptible, when that great event took place. The desires and opinions of the people co-incided with the humours of the King; and the moment parliament had established the Protestant religion, it became not the voice only, but the act of the whole nation.

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The case of Canada is totally different, The people *there adhere to their religion, and did not surrender* without a stipulation and solemn engagement for the free exercise of it. Your Lordship was minister when the capitulation was granted by Sir Jeffery Amherst, and you found no fault with that able General for that prudent and humane concession. This freedom was again insured at the peace, approved and confirmed by parliament; nor did your Lordship, in your long display of eloquence* on that occasion, once blame that part of the treaty. But you are now pleased to call the measure *atrocious, shallow, and inept*, because it has secured to the clergy their property, and because it has substituted an oath of allegiance instead of

* Lord Chatham spoke three hours and a half against the peace.

that

that of supremacy as required by the act of Elizabeth. The best distinction I know between establishment and toleration is, that the greater number has a right to the one, and the less to the other. The public maintenance of a clergy is inherent to *establishment*; at the Reformation, therefore, as much of the church estates as was thought necessary for its support, was transferred to the Protestant church as by law established. Surely then, when the free exercise of the national religion was given to the Canadian nation, it could never be understood that they were to be deprived of their clergy; and if not, a national provision for that clergy follows of course.

It has also been asserted, that the Protestant religion is rooted out of Canada by this bill. The reverse is the truth;

truth ; for no man who *is*, or who may become a Protestant, is to pay tythes or any church dues to the Romish establishment, but the money is still to be collected, in order to constitute a fund for the raising and supporting of a Protestant church in Canada. And little, my Lord, as it may be thought proper to introduce the King's name in a discourse of this nature, yet well-meaning men will be glad to learn, that his Majesty, for some time past, has at his own expence maintained two protestant clergymen in Canada, natives of France, persons of ability and character, recommended by Dr. Majendie, and who are now in that country, executing their functions with diligence and attention. And there is a plan under actual deliberation for the further advancement of the protestant religion.

Some have doubted whether those clauses of the 1 Eliz. which establish the oath of supremacy, extend to any of his Majesty's present dominions but such as belonged to the crown when that memorable statute was made. If this construction is a true one, the Canadians were not obliged to take the oath of supremacy; and the new oath which the Quebec bill has established, is so far an acquisition, and advantageous to the cause of protestantism, as it adds to the common oath of allegiance, and obliges every Catholic of Canada, who shall from henceforth exercise any function, civil or religious, *to renounce all pardons and dispensations from any power or person whomsoever contrary to that oath.* But if we are to suppose the above-mentioned construction to be false, and that every part of the 1st of Eliz. extends to all his Majesty's present dominions,

dominions, I will venture then to assert that the Roman Catholic religion would not have had in Canada even the advantage of a toleration, if the oath of supremacy had not been repealed. For no honest Roman Catholic Priest could have taken that oath in the true sense of the words in which it is expressed; and if he had ventured to exercise any ecclesiastical function without having taken it, he would have been subject to all the penalties and disabilities which the law has in such case inflicted; and that there are persons in Canada ready to commence prosecutions against every offender of this kind, we can hardly doubt, when we recollect that one grand jury thought it their duty to make a public presentment of every Roman Catholic of the province; and must therefore have considered them not only as persons not under the protection of the law, but as

offenders against it. But though the legislature has thought fit to repeal the oath established by the 1st of Eliz. and to substitute another oath in the place of it, which in truth is no more than what has been frequently done before ; yet the King's supremacy is not on that account in any danger, as has been ignorantly and absurdly supposed. The Quebec bill, instead of giving up his Majesty's supremacy, asserts it as established by the 1st of Eliz. ; that is, in all cases, ecclesiastical as well as civil ; no ecclesiastical officer or minister can exercise in Canada any authority or jurisdiction that is not derived from the crown : and if any man shall hereafter presume to exercise therein any powers derived from any foreign authority, or jurisdiction whatsoever, or shall maliciously and advisedly endeavour to advance or support the claims or pretensions

sions of the Pope, or of any foreign prince or state, he will still be subject to the same penalties to which he would have been liable if the Quebec bill had never passed ; and the law of England has still in store punishments fully sufficient to deter the most zealous Catholic of Canada from the commission of such an offence.

Since then your Lordship has been so very severe in your strictures on this part of the Quebec bill, let me again implore you to tell us what plan you yourself would recommend ; Would you now construe the *free exercise of religion* to be less than the Canadians thought it when they threw themselves upon your faith ? Would you now become their persecutor ? Or would you still suffer them to enjoy their religion, with its consequential property ; not however by
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the constitutional authority of an act of parliament, but by virtue of an actual exercise of a dispensing power in the crown?

Your Lordship is said to have asserted these two things; that the bill was intended to raise a strength in Canada, in order to intimidate other parts of America; and then, that the bill was injurious to the Canadians.

The imputed injury is, that the law of France which is despotism, is *entailed*, and the law of England which is freedom, *annulled*.

There is a distinction to be made between the *law* of France, and the *government* of France. The one *is*, the other is *not*, despotic. The law of France originated in freedom. The

Franks

Franks were a people of Germany, who came and settled in Gaul: their kings were elective, and their power so limited, that all their authority was derived from their merit and virtue *. They preserved their liberties till the 13th century, when the first breach was made by Philip the Fair, assisted by Enguerand de Marigni, his prime minister. Nor till the final subversion of the French constitution, are we to date the fluctuations in the administration of their justice, the instability of property, the banishments of their parliaments, together with their lettres de cachet, none of which, my Lord, are the institutions of law, but the excesses of that power, which has arisen upon the *demolition* of law. What a glorious and

* Reges ex nobilitate; duces ex virtute sumunt; nec regibus infinita vel libera potestas. Et duces exemplo potius quam imperio præsent. Tac.

happy

happy revolution would France experience, could you at this moment restore her ancient laws, free from the controul of power !

This is the very blessing in which the Quebec bill instates the Canadians, not *torn* from the church, but separated from the state of Rome ; they are in possession of the law which they love, under a government that must take that law for its guide, where the ministers of the crown can neither issue a general warrant, nor imprison by a *lettre de cachet*, but every illegal or oppressive act that would be impeachable and punishable against an Englishman, will be equally criminal, in respect of the Canadians.

One word to the policy of this bill, and I have done. I do not mean to consider

consider the general policy, whether England had better have rested upon her natural innate strength, or have become the head of a divided empire, over different nations of different faith. Her former state, as in the days of queen Elizabeth, was the theme of poetical rapture.

Oh England, model of thy inward greatness,
Like little body, with a mighty heart.

SHAKESPEARE.

Were the same poet to celebrate your administration, he would speak of England as,

———Besriding the world
Like a Colossus.———

But, my Lord, whomever we pretend to govern, whether natural-born subjects or adopted ones, this is certain, that *that* policy is best, which is best calculated to unite them all in one com-

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mon bond of interest, affection, and duty.

Here, my Lord, let me ask what was your object in *acquiring*, what in *retaining* Canada, but that France might not have at her command a body of men, either to attack our American settlements in time of war, or harass them in time of peace, by inciting the native Indians to invade them? Would you wish, my Lord, to spoil the fruits of your own conquest in the worst manner possible? Which would be, to keep the hearts of the Canadians devoted to France, whenever she might call them to arms.

But there is another consideration which makes the affection of the Canadians still more desirable.—I should be afraid to mention it, if your Lordship
had

had not proclaimed it already ; it is the present state of Boston : Should, my Lord, a fatal necessity arise, (as your Lordship has been too apt both to prognosticate, and to advise) to *coerce* America ; do you wish, in that melancholy event, to combine the heart of the Canadian with that of the Bostonian ? Were Canada now in the possession of France, and should the Bostonians resolve upon rebellion, there can be no doubt whither they would look for support, and for encouragement. But the loss of that hope may happily dispose them to better thoughts.

If then, my Lord, the Quebec bill is founded in that first principle of all law, *the concurrence and approbation of the people*, and if its end is that, for which all government ought to be instituted,

the happiness of the governed, then will this bill which your Lordship thought *atrocious, shallow, and inept*, appear consonant to justice, wisdom, benevolence, and policy; and the legislature of this country will have followed an illustrious example of antiquity, in making such regulations for the Canadians; “ut
 “ in suâ ripâ legibusque suis, mente
 “ animoque nobiscum agant.”

F I N I S.

